UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

J.Y., a minor child, by and through her permanent guardian, FREDDIE EDWARDS,

Plaintiffs,

v.

PARTNERSHIP FOR STRONG FAMILIES, INC., a Florida non-profit Corporation, FAMILY PRESERVATION SERVICES OF FLORIDA, INC., BRITTNEY MOREAU, individually, and JUDITH KING, individually,

Defendants.
_____/

CASE NO.: 1:18-cv-00246-MW-GRJ

DEFENDANT'S, PARTNERSHIP FOR STRONG FAMILIES, INC., MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE

COMES NOW, Defendant, PARTNERSHIP FOR STRONG FAMILIES, INC. (hereinafter "PSF"), by and through its undersigned counsel, and pursuant to Rule 12(b), Fed. R. Civ. P., and Local Rules 5.1 and 7.1, U.S. N.D. Fla., files this Motion to Dismiss Plaintiff's[1] Complaint with Prejudice, and as grounds therefore states as follows:

[1] Though the style of the case and the Complaint itself references "Plaintiffs" rather than "Plaintiff", a review of the style and the Complaint indicate that FREDDIE EDWARDS is bringing this lawsuit solely on behalf of J.Y. and FREDDIE EDWARDS has made no claims individually. Accordingly, there is only one (1) Plaintiff: J.Y., by and through her permanent guardian, FREDDIE EDWARDS.

1. Plaintiff filed her Complaint and Demand for Jury Trial on December 17, 2018. [Doc. 1].

2. PSF was served with a copy of Plaintiff's Complaint on January 4, 2019, pursuant to Plaintiff's Summons Returned Executed filed on January 9, 2019. [Doc. 8].

3. Count I of Plaintiff's Complaint is brought solely against PSF pursuant to 42 U.S.C. § 1983, and seeks to allege that PSF's provision of foster care services to J.Y., under color of state law, violated J.Y.'s rights guaranteed under the Fourteenth Amendment of the United States Constitution. [Doc. 1, paras. 70-83].

4. In support, Plaintiff variously alleges that such constitutional violations occurred while J.Y. was in the custody of the State of Florida, and were the result of PSF's "deliberate indifference and/or recklessness" in the provision of its foster care services and as to the safety and welfare of J.Y.; by PSF's establishment of "customs, polices, or practices" in rendering its foster care services that resulted in harm to foster care children, including J.Y.; and by PSF's "actions and failures to act [that] were done with knowledge that said actions would deprive J.Y. of her constitutional rights to be free from harm". [Doc. 1, paras. 75-80].

5. Count V of Plaintiffs' Complaint is brought jointly against PSF and Co-Defendant, FAMILY PRESERVATION SERVICES OF FLORIDA, INC. (hereinafter "FPS"), and seeks to allege that PSF and FPS were negligent in providing foster care services to J.Y. under Ch. 409, Fla. Stat. [Doc. 1, paras. 134-145].

6. Under Rule 12(b)(6), Fed. R. Civ. P., a party may assert the defense of failure to state a claim upon which relief can be granted pursuant to a motion to dismiss.

7. Both Counts I and V of Plaintiff's Complaint against PSF do not, and cannot, state a claim upon which relief can be granted as to PSF.

8. Accordingly, dismissal of Counts I and V of Plaintiff's Complaint against PSF, with Prejudice, is proper.

MEMORANDUM OF LAW

A. Legal Basis to Grant a Motion to Dismiss

Rule 12(b), Fed. R. Civ. P., provides in pertinent part:

> (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
> …
> (6) failure to state a claim upon which relief can be granted;
> …

> A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. … No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 1959 (2007).

"In considering a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6), the Court's analysis is generally limited to the four corners of the complaint and the attached exhibits. … The Court must accept the non-moving party's well-plead facts as true and construe the complaint in the light most favorable to that party." *Realbiz Media Grp. v. Monaker Grp.*, 2017 WL 3107177 (S.D. Fla. 02/24/17) (internal citations omitted).

"To survive a motion to dismiss, the complaint must contain factual allegations which are 'enough to raise a right to relief above the speculative level'. … 'When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief'. … The issue to be decided is not whether the plaintiff will ultimately prevail, but 'whether the [plaintiff] is entitled to offer evidence to support the claims'." *Id.* at 6. (internal citations omitted).

B. Basis for Dismissal With Prejudice of Count I of Plaintiff's Complaint

I. Statement of Undisputed Facts

At all times material to Plaintiff's Complaint, PSF, under color of state law, was the lead agency / community based provider for Alachua County and other counties in North Florida pursuant to its contractual relationship with the Florida Department of Children and Families (hereinafter "DCF") to provide child welfare services[2] to children in the custody of the State of Florida pursuant to Ch. 409, Fla. Stat. [Doc. 1, paras. 10, 73, and 136].

At all times material to Plaintiff's Complaint, as to Alachua County, PSF sub-contracted with FPS for the provision of case management services required by its contract with DCF, pursuant to § 409.988(1)(j). [Doc. 1, paras. 13 and 15].

Since 2003, on multiple occasions, J.Y. was adjudicated dependent, thereafter sheltered and/or transferred into the custody of a parent and/or relative legal guardian under protective supervision[3], and subsequently placed into the permanent custody of that parent and/or relative legal guardian with termination of

[2] "Child Welfare Services" means core child protection programs, such as the Florida Abuse Hotline, protective investigations, protective supervision, post-placement supervision, foster care and other out-of-home care, or adoption services. *See* Rule 65C-30.001(19), F.A.C. (*See also* § 409.986(3)(a) and (e), Fla. Stat., providing the statutory definitions for the "care" and "related services", respectively, that constitute the child welfare services provided in the State of Florida).

[3] "Protective supervision" means a legal status in dependency cases which permits the child to remain safely in his or her own home or other nonlicensed placement under the supervision of an agent of the department and which must be reviewed by the court during the period of supervision. *See* § 39.01(71), Fla. Stat.

protective supervision, via dependency orders of the Circuit Court of the Eighth Judicial Circuit, in and for Alachua County, Florida. [Doc. 1, paras. 7, 24, 28, 34, 37, 41, 52, 54, 63, and 66].

Under its contracts with DCF and FPS, and pursuant to Circuit Court Orders, PSF provided protective supervision and related services to J.Y. [Doc. 1, paras. 7 and 10].

Specific to this matter, PSF, by and through FPS, provided protective supervision to J.Y. from May 12, 2014 (the date she was placed with her father, George Young) until June 8, 2014, when the Circuit Court terminated its jurisdiction over J.Y., thereby terminating PSF's provision of services to J.Y. [Doc. 1, paras. 49, 51, 52, 54, and 56].

On March 2, 2015, it was reported that George Young had been sexually battering J.Y. since January of 2015, i.e., since approximately seven (7) months after the termination of the Circuit Court's jurisdiction and of PSF's protective supervision services to J.Y. [Doc. 1, para. 62].

On March 4, 2015, J.Y. was sheltered from George Young and permanently placed with Plaintiff, FREDDIE EDWARDS, her maternal grandfather. [Doc. 1, para. 63 and 66].

On March 10, 2015, J.Y. disclosed that George Young had been sexually battering her since October of 2014, i.e., approximately four (4) months after the

termination of the Circuit Court's jurisdiction and of PSF's protective supervision services to J.Y. [Doc. 1, para. 64].

II. 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment

Count I of Plaintiff's Complaint is brought solely against PSF under 42 U.S.C. § 1983, which provides in its entirety:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Count I of Plaintiff's Complaint is premised upon PSF's alleged "deprivation, under color of state law" of J.Y.'s "right to be safe and free from unreasonable risk of harm while in state custody" as "guaranteed under the Fourteenth Amendment of the United States Constitution and applicable federal laws". [Doc. 1, paras. 71 and 74].

Although not enunciated in Plaintiff's Complaint, it is evident that Plaintiff is referring to J.Y.'s constitutional interest in liberty and thus her substantive due

process right, rather than her procedural due process right. *See Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1987).

Further, Plaintiff seeks only compensatory damages from PSF, which is the sole remedy available for a substantive due process violation, while the primary relief sought for a procedural due process violation is in equity. *See McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994).

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "[N]o State shall … deprive any person of life, liberty, or property, without due process of law …"

The historical purpose behind the Due Process Clause was described by Chief Justice Rehnquist in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989), in pertinent part, as follows:

> Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government from 'abusing [its] power, or employing it as an instrument of oppression'. … Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. (internal citations omitted) (emphasis supplied).

The Supreme Court has long-provided the following guidance in considering alleged substantive due process violations brought under § 1983 for physical harm incurred by a plaintiff. As described in *Nix v. Franklin County School Dist.*, 311 F.3d 1373, 1376 (11th Cir. 2002):

> Before proceeding to analysis of the [plaintiff's] due process claim, we must pause to consider the pronouncements of the Supreme Court regarding the boundaries separating tortious injuries from constitutional harms. … When shaping the contours of the due-process law, the [Supreme] Court has often emphasized the need to prevent the Fourteenth Amendment from becoming a surrogate for conventional tort principles. Confining liability to more culpable actors, as suggested in *Sacramento*, is in accordance with the intent of the Due Process Clause: ' "to secure the individual from the arbitrary exercise of the powers of the government' ". *See Daniels v. Williams*, 474 U.S. 331, 106 S.Ct. 662 (1986) (*quoting Hurtado v. California*, 110 U.S. 516, 527 4 S.Ct. 111 (1884)) *(ref. to County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998)).

III. Substantive Due Process Violations in Non-Custodial and Custodial Settings

Under almost all circumstances in which a § 1983 action alleges a State's actions and/or inactions proximately caused a person harm by a private actor, it is settled that this does not, and cannot, amount to a substantive due process violation.

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law", but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

> …
> …[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual. … If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause. *DeShaney* at 194-197. (internal citations omitted) (emphasis supplied).

Even where, as here, it is alleged that such State actions were deliberately indifferent, the 11th Circuit "has been explicit in stating that 'deliberate indifference' is insufficient to constitute a due-process violation in a non-custodial setting: 'While deliberate indifference to the safety … may constitute a tort under state law, it does not rise to the level of a substantive due process violation under the federal Constitution.' *Nix* at 1377. (*citing White v. Lemacks*, 183 F.3d 1253, 1259 (11th Cir. 1999).

"[I]f the plaintiff alleging the rights violation is in no custodial relationship with the state, then state officials can violate the plaintiff's substantive rights only when the officials cause harm by engaging in conduct that is 'arbitrary, or conscience shocking, in a constitutional sense'. … 'Only the most egregious official

conduct can be said to be arbitrary in the constitutional sense.' *Doe v. Braddy*, 673 F.3d 1313, 1318 (2012).

However, Plaintiff has raised a particular issue in her Complaint that attempts to remove the case at bar from the general applicability of *DeShaney* and its progeny; that J.Y. was in the "custody" of the State of Florida and receiving child welfare services, specifically foster care services, from PSF, under color of law, when PSF violated J.Y.'s substantive due process rights. [Doc. 1, paras. 71 and 75].

As such, PSF acknowledges that, in the narrow circumstance where a State's alleged substantive due process violation caused a person to be harmed while they were in a custodial setting, it is possible for that person to plead a § 1983 claim sufficient to survive a motion to dismiss under Rule 12(b)(6).

> The Supreme Court recognized a liberty interest in a person involuntarily committed to a custodial setting in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1983).
> …
> [Pursuant to *Youngberg*], [a] child confined to a state mental health facility has a fourteenth amendment substantive due process liberty interest in reasonably safe living conditions. … Similarly, if foster parents with whom the state places a child injure the child, and that injury results from state action or inaction, a balancing of interests may show a deprivation of liberty.
> …
> In this case, the child's physical safety was a primary objective in placing the child in the foster home. The state's action in

> assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety of that environment. (some internal citations removed). *Taylor* at 794-795.

However, for the reasons that follow, it is evident that the *DeShaney* non-custodial setting standards are applicable to this case, and, as a result, Plaintiff has failed to state a cause of action against PSF.

IV. Plaintiff's Incorrect and/or Inapplicable Legal Allegations and Conclusions

Plaintiff's Complaint contains numerous incorrect and/or inapplicable legal allegations and conclusions which evince Plaintiff's fundamental misunderstandings of the State of Florida's multi-disciplinary scheme for the provision of child welfare services, and of the disparate requirements and goals thereunder.[4]

As a result, Count I of Plaintiff's Complaint does not, and cannot, state a claim upon which relief can be granted as to PSF.

1). J.Y. Was Never In "Foster Care" and Never Received "Foster Care" Services

Pursuant to the "Undisputed Statement of Facts" section of this Motion, *supra*, and as tacitly acknowledged in the "General Allegations" section of

[4] *See, generally,* § 409.986(3)(a) and (e), providing the statutory definitions for the "Care" and "Related services", respectively, that constitute the child welfare services provided in the State of

Plaintiff's Complaint, J.Y. has never been in the State of Florida's "foster care" system or otherwise been a recipient of "foster care" services, whatsoever. [Doc. 1, paras. 24-69].

> "Foster care" means care provided a child in a foster family or boarding home, group home, agency boarding home, child care institution, or any combination thereof. *See* § 39.01(30), Fla. Stat.

The State of Florida has established licensure requirements for the purpose of protecting "the health, safety, and well-being of all children in the state who are cared for by family foster homes, residential child-caring agencies, and child-placing agencies". *See* § 409.175(1)(a), Fla. Stat.

A "parent or legal guardian" having custody of a child is specifically excluded from the statutory foster licensure requirements under Ch. 409, Fla. Stat., because such custodial situations do not constitute "foster care" services. *See* §409.175(2)(d), (e), and (l).

As such, there are substantially disparate and unrelated requirements, standards, and goals for a child receiving "foster care" services versus "non-foster care" services, and likewise for PSF in establishing, providing, and enforcing "foster care" services or "non-foster care" services as a community-based care lead agency. *See, generally*, Chs. 39 and 409, Fla. Stat., and Ch. 65C-30, F.A.C.

Florida. (*See also* Rule 65C-30.001(19), F.A.C., providing the administrative definition of "Child Welfare Services".

Here, at all times when J.Y. was not in the individual custody of her parents (George Young or Dena Edwards), J.Y. was in the individual custody of relatives or relatives who were appointed as legal guardians (Monica Walker, Lashay Walker, and Freddie Edwards), as described *infra*.

The "General Allegations" section of Plaintiff's Complaint accordantly describes the entirety of all child welfare services, including protective supervision, provided to J.Y. by the State of Florida as the following various, exclusively "non-foster care", services: [Doc. 1, Paras. 24-69].

> At times, J.Y. was "sheltered" and "placed" in the individual "temporary legal custody" of her "relatives", Monica Walker (J.Y.'s maternal first cousin once removed) and Lashay Walker (J.Y.'s maternal great-aunt). [Doc. 1, paras. 27, 28, and 41].

> > "Shelter" means a placement with a relative or a nonrelative, or in a licensed home or facility, for the temporary care of a child who is alleged to be or who has been found to be dependent, pending court disposition before or after adjudication. *See* § 39.01(78), Fla. Stat.
>
> > "Placement" means the supervised placement of a child in a setting outside the child's own home. *See* Rule 65C-30.01(88), F.A.C.
>
> > "Temporary legal custody" means the relationship that a court creates between a child and an adult relative of the child … until a more permanent arrangement is ordered. *See, in pertinent part*, § 39.01(86), Fla. Stat.

> "Relative" means a grandparent, great-grandparent, sibling, first cousin, aunt, uncle, great-aunt, great-uncle, niece, or nephew, whether related by the whole or half blood, by affinity, or by adoption. *See* § 39.01(73), Fla. Stat.

At times, J.Y. was placed in the individual "permanent guardianship" of her relatives, Monica Walker and Freddie Edwards (J.Y.'s maternal grandfather). Doc. 1, Paras. 37 and 66].

> "Permanent guardianship of a dependent child" means a legal relationship that a court creates under s. 39.6221 between a child and a relative or other adult approved by the court which is intended to be permanent and self-sustaining through the transfer of parental rights with respect to the child relating to protection, education, care and control of the person, custody of the person, and decisionmaking on behalf of the child. *See* § 39.01(62), Fla. Stat.

At times, J.Y. received "protective supervision" while in the individual legal custody of Monica Walker, Lashay Walker, and George Young. [Doc. 1, Paras. 37, 43, and 54].

> "Protective supervision" means a legal status in dependency cases which permits the child to remain safely in his or her own home or other nonlicensed placement[5] under the supervision of an agent of the

[5] *e.g.*, J.Y.'s individual periods of custody under Monica Walker, Lashay Walker, and George Young, because such "parent[s] or legal guardian[s]" are specifically excluded from the statutory foster licensure requirements. *See* § 409.175(1)(a) and (2), Fla. Stat.

> department and which must be reviewed by the court during the period of supervision. *See* § 39.01(71), Fla. Stat.

Because it is incontrovertible that J.Y. was never in "foster care" and never received "foster care" services in the State of Florida, the non-custodial standards of *DeShaney* are controlling, and the custodial standards of *Taylor* are inapplicable.

As a result, the following allegations of Count I of Plaintiff's Complaint are facially all legally incorrect, misapplied, and/or immaterial, such that they offer no support to a finding of liability against PSF, to wit: Paragraphs 73, 74, and 75(c)-(e).

As J.Y. was never in "foster care" or a recipient of "foster care services" whatsoever, it is manifest that each and every allegation of Plaintiff's Complaint concerning "foster care" and/or the statutory provisions for same, is without any merit and must be disregarded by this Court.

Therefore, the foregoing allegations of Count I of Plaintiff's Complaint do not, and cannot, provide any support for Plaintiff's attempt to state a cause of action against PSF for violation of J.Y.'s substantive due process rights under 42 U.S.C. § 1983, nor any defense against this Motion.

2). J.Y. Was Never Harmed While in the Custody of the State of Florida and/or While Receiving Child Welfare Services, including Protective Supervision, From PSF

In the context of child welfare services in the State of Florida, "harm" to a child's health or welfare is statutorily defined under § 39.01(35), Fla. Stat. The provisions potentially pertinent to Plaintiff's allegations are as follows:

> "Harm" to a child's health or welfare can occur when any person:
>
> > (a) Inflicts or allows to be inflicted upon the child physical, mental, or emotional injury…
> >
> > (b) Commits, or allows to be committed, sexual battery … or lewd or lascivious acts … against the child.
> >
> > (c) Allows, encourages, or forces the sexual exploitation of a child…
> > …
> > (e) Abandons the child…
> >
> > (f) Neglects the child…
> > …
> > (g) Exposes a child to a controlled substance or alcohol…
> > …
> > (i) Engages in violent behavior that demonstrates a wanton disregard for the presence of a child and could reasonably result in serious injury to the child.
> >
> > (j) Negligently fails to protect a child in his or her care from inflicted physical, mental, or sexual injury caused by the acts of another.

Pursuant to the "General Allegations" section of Plaintiff's Complaint, J.Y. is alleged to have been "harmed" by her parent(s) and/or relative legal guardian(s) in the following individual instances:

> J.Y. was "abused, neglected, failed to [be] protect[ed] and abandoned" by Dena Edwards. [Doc. 1, Paras. 25, 27].
>
> J.Y. was "abandoned and failed to [be] protect[ed]" by George Young. [Doc. 1, Paras. 26, 42].
>
> J.Y. was "continuously exposed to physical abuse, substance exposure, failure to protect, and domestic violence between Monica Walker and her paramour, Darryl White". [Doc. 1, Paras. 38, 40].
>
> J.Y. was "sexually abused" by Darryl White. [Doc. 1, Para. 39].
>
> J.Y. was "sexually abused" and "exposed to a controlled substance" by George Young. [Doc. 1, Paras. 62 and 64].

Significantly, each and every specific allegation of "harm" incurred by J.Y. by a legal custodian as described in Plaintiff's Complaint occurred while J.Y. was not in the custody of the State of Florida, and while J.Y. was not receiving any child welfare services, including protective supervision, from PSF; to wit:

> Dena Edwards abused, neglected, and failed to protect J.Y. before she abandoned J.Y. at Monica Walker's home; thereafter, J.Y. was sheltered with Monica Walker by the State of Florida. [Doc. 1, Paras. 27 and 28].

> George Young abandoned and failed to protect J.Y. from the time she was born until October of 2013; thereafter, George Young obtained temporary custody (with protective supervision) and then permanent custody (with no child welfare services, including no protective supervision) over J.Y. [Doc. 1, Paras. 26, 42, 49, and 52].
>
> Monica Walker obtained permanent custody (with no child welfare services, including no protective supervision) over J.Y.; thereafter, Monica Walker physically abused J.Y., exposed J.Y. to controlled substances, failed to protect J.Y., and exposed J.Y. to domestic violence between Monica Walker and Darryl White, and Darryl White sexually abused J.Y. As a result, J.Y. was subsequently removed from Monica Walker's custody. [Doc. 1, Paras. 38, 39, 40, 41].
>
> George Young obtained permanent custody over J.Y., and all child welfare services were subsequently terminated on June 8, 2014, including protective supervision; approximately four (4) months thereafter, George Young began sexually abusing J.Y. and exposing J.Y. to controlled substances. As a result, J.Y. was subsequently removed from George Young's custody. [Doc. 1, Paras. 52, 54, 62 and 64].

Likewise, in *DeShaney*, "the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor". *Id.* at 201. Accordingly, the Supreme Court made the following observation:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter

> this analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua. *Id.*

Because it is incontrovertible that J.Y. was never "harmed" while in the custody of the State of Florida or while receiving any child welfare services, including protective supervision, from PSF, the non-custodial standards of *DeShaney* are controlling, and the custodial standards of *Taylor* are inapplicable.

As a result, the following allegations of Count I of Plaintiff's Complaint are facially all legally incorrect, misapplied, and/or immaterial, such that they offer no support to a finding of liability against PSF, to wit: Paragraphs 74, 75(a), 75(b), 75(d), and 75(e).

It is manifest that each and every allegation of Plaintiff's Complaint concerning "harm" incurred by J.Y. while she was in the "custody" of the State of Florida is without any merit and must be disregarded by this Court. Plaintiff does not, and cannot, have any additional underlying standing or other factual basis.

Therefore, the foregoing allegations of Plaintiff's Complaint do not, and cannot, provide any support for Plaintiff's attempt to state a cause of action against PSF for violation of J.Y.'s substantive due process rights under 42 U.S.C. § 1983, nor any defense against this Motion.

3). Child Welfare Services, Including Protective Supervision, Do Not Provide a Right to be Free From Harm

Plaintiff's Complaint incorrectly alleges that PSF has "constitutional and statutory duties to ensure that each child in its care was free from harm", and that J.Y. has a "constitutional right to be free from harm". [Doc. 1, Paras. 75(e), 79, 80].

As is evident from the plainly impracticable nature of these allegations, no such rights exist in the provision or receipt of child welfare services, including protective supervision, whether constitutional, statutory, or otherwise.

Rather, it is the goal, not the right, for a child receiving child welfare services "to enjoy individual … liberty … and the protection of their civil and legal rights as persons in the custody of the state"; and it is further "the goal of the department" that "children are first and foremost protected from abuse and neglect". *See, respectively,* § 39.4085(2) and § 409.986(2)(a), Fla. Stat. (emphasis supplied).

Accordingly, the foregoing allegations of Plaintiff's Complaint do not, and cannot, provide any support for Plaintiff's attempt to state a cause of action against PSF for violation of J.Y.'s substantive due process rights under 42 U.S.C. § 1983, nor any defense against this Motion.

4). It Was Not Reasonably Foreseeable that George Young Would Sexually Abuse His Minor Child, J.Y.

Plaintiff makes several allegations in the Complaint that based on George Young's criminal history results, PSF knew that J.Y. was in danger of incurring the "harm" eventually perpetrated upon her by George Young. [Doc. 1, Paras. 48, 53, and 59].

George Young's criminal history check, however, did not evince any inclination or other concern to suspect the potential that George Young would later sexually abuse his minor child, J.Y. [Doc. 1, Para. 48].

To that end, examples of criminal history records which do raise such a level of suspicion are set forth under § 39.0139, Fla. Stat., and were promulgated for the purpose of the Legislature's expressed "intent to protect children and reduce the risk of further harm to children who have been sexually abused or exploited by a parent or other caregiver", as follows:

> (3)(a) A rebuttable presumption of detriment to a child is created when:
>
> …
>
> 2. A parent or caregiver has been found guilty of, regardless of adjudication, or has entered a plea of guilty or nolo contendere to, charges under the following statutes or substantially similar statutes of other jurisdictions:
>
> a. Section 787.04, relating to removing minors from the state or concealing minors contrary to court order;

> b. Section 794.011, relating to sexual battery;
>
> c. Section 798.02, relating to lewd and lascivious behavior;
>
> d. Chapter 800, relating to lewdness and indecent exposure;
>
> e. Section 826.04, relating to incest; or
>
> f. Chapter 827, relating to the abuse of children; or
>
> 3. A court of competent jurisdiction has determined a parent or caregiver to be a sexual predator as defined in s. 775.21 or a parent or caregiver has received a substantially similar designation under laws of another jurisdiction.

George Young's criminal history check did not contain a single arrest or conviction for any of the enumerated offenses that would have created a rebuttable presumption of detriment to J.Y. as set forth in § 39.0139(3)(a), Fla. Stat. [Doc. 1, Para. 48].

In fact, George Young's criminal history check did not contain a single arrest or conviction for any sexual crime or for any crime against a minor, whatsoever.

As such, it was not reasonably foreseeable to suspect that George Young would later perpetrate incestuous sexual abuse upon J.Y., and the allegations of Plaintiff's Complaint to the contrary do not, and cannot, provide any support for

Plaintiff's attempt to state a cause of action against PSF for violation of J.Y.'s substantive due process rights under 42 U.S.C. § 1983, nor any defense against this Motion.

V. George Young's Custody of J.Y.

As to the grounds leading to George Young obtaining temporary custody (with protective supervision) and then permanent custody (with no child welfare services, including termination of protective supervision) over J.Y., Plaintiff has alleged that a litany of individual actions and failures to act by the Defendants to this action, by the Circuit Court, and/or by other involved third parties, led to J.Y.'s dependency disposition into the custody of George Young, and proximately caused J.Y. to subsequently incur "harm" by George Young. [Doc. 1, Paras. 44-61, 75(a)-(e), 76-82].

However, because J.Y. was never removed or adjudicated dependent from George Young from the time she was born until she was sheltered on March 4, 2015, George Young was a "non-offending" parent at all times material to the Circuit Court granting him custody over J.Y.; as such, Plaintiff has failed to identify, and consequently has failed to rely upon, the applicable statutory goals of the Circuit Court; to wit, § 39.621, Fla. Stat., which provides, in pertinent part, as follows:

> (1) Time is of the essence for permanency of children in the dependency system. …
>
> (2) The permanency goal of maintaining and strengthening the placement with a parent may be used in all of the following circumstances:
>
> …
> (b) If a child has been removed from a parent and is placed with the parent from whom the child was not removed, the court may leave the child in the placement with the parent from whom the child was not removed with maintaining and strengthening the placement as a permanency option.

It is evident from the allegations of Plaintiff's Complaint that this "permanency goal" was sought by the Circuit Court in J.Y.'s dependency action, to wit:

> "On April 7, 2014[6], the General Magistrate filed her Report and Recommendations and Order on Judicial Review/Permanency hearing finding that it was in the best interest of J.Y. to be placed in the temporary custody of her father, George Young, under the protective supervision of the PFS [sic] and FPS." [Doc. 1, Para. 49].
>
> "The General Magistrate's Report and Recommendations was approved, ratified, confirmed and adopted by a circuit court judge on April 6, 2014[6]." [Doc. 1, Para. 51].

[6] Plaintiff's Complaint contains an apparent, but harmless, scrivener's error, in that it alleges that the Circuit Court approved the Report and Recommendations on April 6, 2014, one day *before* the Report and Recommendations were filed on April 7, 2014.

> "A status conference was held on May 8, 2014, finding that J.Y would be placed in the custody of her father, George Young, on May 12, 2014, following a completed safety plan by Defendant MOREAU involving other relatives who lived in the home; and the Department recommended that the court terminate protective supervision of J.Y. once she had been placed in the custody of her father, George Young." [Doc. 1, Para. 52].
>
> "In her Order of May 9, 2014, the General Magistrate recommended that, among other things, protective supervision for J.Y. be terminated on June 8, 2014." [Doc. 1, Para. 54].
>
> "The General Magistrate's Report and Recommendations were approved, ratified, confirmed and adopted by a circuit court judge on May 11, 2014." [Doc. 1, Para. 56].

These orders of the Circuit Court comport with the primacy of parental custody over a child pursuant to the expressed permanency goals available under Ch. 39, Fla. Stat., which, in order of preference, are: (a) reunification[7]; (b) adoption; (c) permanent guardianship; (d) permanent placement with a fit and willing relative; or (e) placement in another planned permanent living arrangement. *See* § 39.621(3)(a)-(e).

VI. Plaintiff Has Failed to State a Cause of Action Against PSF

As established *supra*, because each and every instance of "harm" alleged to have been incurred by J.Y. occurred while J.Y. was in the custody of a parent or a

[7] "Reunification services" means social services and other supportive and rehabilitative services provided to the parent of the child [and] to the child … for the purpose of enabling a child who

relative legal guardian and not receiving child welfare services, including protective supervision, from PSF, *DeShaney* is controlling here in that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause". *DeShaney* at 197.

> In short, areas in which substantive rights are created only by state law … are not subject to substantive due process protection under the Due Process Clause because "substantive due process rights are created only by the Constitution". *McKinney* at 1556.

See also Knight v. Jacobson, 300 F.3d 1272, 1276 (11th Cir. 2002) ("Section 1983 does not create a remedy for every wrong committed under the color of state law, but only for those that deprive a plaintiff of a federal right. … While the violation of state law may (or may not) give rise to a state tort claim, it is not enough by itself to support a claim under section 1983." (internal citations omitted).

Particularly germane to this action is *Harris v. G.K.*, 187 So.3d 871 (Fla. 3d DCA 2016), which concerned severe emotional and physical abuse perpetrated by adoptive parents upon their adoptive children (i.e., abuse perpetrated while the children were not in the custody of the State of Florida), and in which both children's individual complaints "contained the requisite allegations of intentional violations and deliberate indifference", as follows:

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has been placed in out-of-home care to safely return to his or her parent at the earliest possible time… *See, in pertinent part,* § 39.01(74), Fla. Stat.

> [N]atural or adoptive parents have the legal duties to protect and support the natural or adoptive children, while the state agency and its employees have the duty to protect the foster children from a substantial risk of harm from others (including the foster parents). 'The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.' *DeShaney* at 200. DCF and its employees do not restrict the freedom of natural or adoptive children after adoption as DCF and its employees are empowered to do in the case of foster children. *Harris* at 875. (emphasis supplied).

Because it is conclusively established that J.Y. was not in a custodial setting with the State of Florida and not receiving child welfare services, including protective supervision, from PSF at each and every individual time she incurred "harm" as alleged in Plaintiff's Complaint, there remains only one way in which PSF could possibly have violated J.Y.'s substantive due process rights:

> [W]e have said that, if the plaintiff alleging the rights violation is in no custodial relationship with the state, then state officials can violate the plaintiff's substantive due process rights only when the officials cause harm by engaging in conduct that is "arbitrary, or conscience shocking, in a constitutional sense." *White* at 1257. (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 1070, 117 (1992)). "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Sacramento* at 1716. (internal quotations omitted). In addition, this standard "is to be narrowly interpreted and applied," *White* at 1259, such that "even intentional wrongs seldom violate the Due

> Process Clause." *Waddell v. Hendry Cnty. Sheriff's Office*, 329 F.3d 1300, 1305 (11th Cir.2003). *Braddy* at 1318.

Here, even when taken as true for the purposes of this Motion, not a single allegation in Plaintiff's Complaint lodged against PSF comes near the requisite "conscience shocking" standard.

> We have … rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. *Daniels* at 328; see also *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670–671 (1986) (clarifying that *Daniels* applies to substantive, as well as procedural, due process). It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. *See Daniels* at 331 ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original)). *Sacramento* at 848.

VII. Conclusion

Count I of Plaintiff's Complaint fails to state a cause of action against PSF for violation of J.Y.'s substantive due process rights brought under 42 U.S.C. § 1983, for the following reasons:

> J.Y. was never in "foster care" and never received "foster care" services;
>
> J.Y. was never "harmed" while in the custody of the State of Florida and/or while receiving child welfare services, including protective supervision, from PSF;
>
> J.Y. did not have a right, and the State of Florida and PSF did not have an obligation, to ensure that J.Y. was free from harm in her receipt of child welfare services, including protective supervision;
>
> George Young's criminal history check did not contain any offense enumerated under § 39.0139(3)(a), Fla. Stat., such that it was not reasonably foreseeable that George Young would later sexually abuse his minor child, J.Y.; and
>
> George Young, as a non-offending, noncustodial parent, obtained temporary custody (with protective supervision) and then permanent custody (with no child welfare services, including no protective supervision) of J.Y., pursuant to § 39.521(3)(b), Fla. Stat.

As such, pursuant to *DeShaney* and *Braddy*, PSF is not, and cannot be, liable to J.Y. for violating her substantive due process rights pursuant to 42 U.S.C. § 1983.

As to Count V, Plaintiff has failed to state a cause of action pursuant to Florida law, as PFS had no duties to Plaintiff after the termination of its supervision, which is when Plaintiff alleges in her Complaint that the alleged injuries were incurred.

Accordingly, Plaintiff's Complaint against PSF should be dismissed, with prejudice, for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b), Fla. R. Civ. P. In the alternative, Count I of Plaintiff's Complaint against PSF should be dismissed, with prejudice, and Count V should be dismissed without prejudice to allow Plaintiff to file her Complaint in State Court for further proceedings if she deems appropriate.

WHEREFORE, based upon the foregoing, Defendant, PARTNERSHIP FOR STRONG FAMILIES, INC., respectfully requests this Honorable Court to Dismiss Plaintiff's Complaint With Prejudice for failing to state a claim upon which relief can be granted, and for such further relief as deemed necessary and proper.

CERTIFICATE OF WORD COUNT

I HEREBY CERTIFY that this Motion (including footnote) consists of 446 words and that this Memorandum (including footnotes) consists of 6,538 words, for a total of 6,984 words, and thus this filing is compliant with the 8,000 word limitation set forth under Rule 7.1(F), Fla. N.D. Local Rules.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 2019, a true and correct copy of the foregoing, Defendant, PARTNERSHIP FOR STRONG FAMILIES, INC.'s, Motion to Dismiss Plaintiff's Complaint With Prejudice, was electronically filed with the Clerk of Court using the CM/ECF system which will

send an electronic notice of such filing to counsel for Plaintiff and counsel for Co-Defendants, and sent by e-mail delivery to: all counsel of record.

s/ Dylan J. Hall, Esq.
DYLAN J. HALL, ESQ.
Florida Bar No. 112528
LISA J. AUGSPURGER, ESQ.
Florida Bar No. 892451
BUSH & AUGSPURGER, P.A.
411 E. Jackson Street
Orlando, FL 32801
(407) 422-5319
(407) 849-1821 – FAX
lja@bushlawgroup.com
djh@bushlawgroup.com
slo@bushlawgroup.com
Attorneys for Defendant
Partnership for Strong Families, Inc.